Table of Contents

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 1

Constitutional and Statutory Provisions Involved 2

Statement of Facts 3

Points To Be Relied On—

I. THE DECISION BELOW IS CLEARLY CORRECT. NONE OF PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED AT TRIAL 5

II. PETITIONER'S SENTENCE DOES NOT PRESENT AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW 12

Conclusion 14

Certificate of Service 14

TABLE OF AUTHORITIES

Aldridge v. *United States*, 238 U.S. 308, 51 S. Ct. 470, 75 L. Ed. 1054 (1931) 7

Giles v. *State*, 183 A. 2d 359, 229 Md. 370 (1962); cert. denied 372 U.S. 767, 83 S. Ct. 1102, 10 L. Ed. 2d 137 (1963) 8

Ham v. *North Carolina*, 409 U.S. 524, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1972) 7

Kokatsu v. *United States*, 351 F. 2d 898, 904 (9th Cir. 1965) 10

Martin v. *Commonwealth*, 493 S.W. 2d 714 (Ky. Ct. of App., 1973) 12

Rogers v. *State*, 257 Ark. 144, 515 S.W. 2d 79, (1974) 1, 5

State v. *Brooks*, 111 S. E. 2d 686, (S. C. S. Ct., 1959); cert. denied 365 U.S. 300, 81 S. Ct. 707, 5 L. Ed. 2d 689 (1961) 8

United States v. *Bamberger*, 456 F. 2d 1119 (3rd Cir. 1972) 8

United States v. *Delay*, 500 F. 2d 1361, 1366 (8th Cir. 1974) 8

United States v. *Liss*, 137 F. 2d 995, 999 (2nd Cir. 1943); cert. denied 320 U.S. 772, 64 S. Ct. 78, 88 L. Ed. 462 (1943) 11

United States v. *Powers*, 482 F. 2d 941 (8th Cir. 1973); cert. denied 415 U.S. 923, 94 S. Ct. 1426, 39 L. Ed. 2d 479 (1974) 8

United States v. *Ross*, 321 F. 2d 61, 66 n. 3 (2nd Cir. 1963); cert denied. 375 U.S. 894, 84 S. Ct. 170, 11 L. Ed. 2d 418 (1964) 11

United States v. *Thompson*, 490 F. 2d 1128 (8th Cir. 1974) 8

Walker v. *Bishop*, 408 F. 2d 1378 (8th Cir. 1969) 11

Weems v. *United States*, 217 U.S. 349, 371, 30 S. Ct. 544, 54 L. Ed. 793 (1910) 12

Workman v. *Commonwealth*, 429 S.W. 2d 374 (Ky. Ct. of App., 1968) 12

Statutes and Constitutional Provisions:

62 A.L.R. 2d 198-199 10

Ark. Stat. Ann. § 41-3403 (Supp. 1973) 2

Ark. Stat. Ann. § 43-2807(b) (1947) 3

Ark. Stat. Ann. § 43-2306 (Repl. 1964) 9

U. S. Constitution, Sixth Amendment 2

U. S. Constitution, Eighth Amendment 2

U. S. Constitution, Fourteenth Amendment 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1004

HAROLD EUGENE ROGERS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 257 Ark. 144, 515 S.W. 2d 79 (1974) and is reproduced at page 1(a) of the Supplemental Appendix to the Petition.

JURISDICTION

The respondent is willing to stipulate that the jurisdictional requisites are adequately set forth in the Petition

QUESTIONS PRESENTED

(1) Whether the trial court erred in not allowing sufficient voir dire examination by defense counsel on the issue of the

racial prejudice of the potential jurors to permit an intelligent exercise of the peremptory challenge.

(2) Whether the trial judge exhibited such bias before the panel of the jury and otherwise that it deprived the Petitioner of an impartial trial and due process of law.

(3) Whether the sentence of life imprisonment without an opportunity for parole, imposed upon a first offender minor, whose offense resulted in no physical harm to the victim, is so excessive and disproportionate to the illegal act as to constitute cruel and unusual punishment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) This case involves the Sixth Amendment to the United States Constitution.

(2) This case also involves the Eighth Amendment to the United States Constitution.

(3) This case also involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution (Section 2 of the Fourteenth Amendment).

(4) This case also involves relevant portions of Act 362 of 1967 Arkansas Legislature (Ark. Stat. Ann. § 41-3403 [Supp. 1973]), as set out below:

> "Any male, upon conviction of first degree rape, shall be subject to death or thirty (30) years to life imprisonment in the State Penitentiary."

(5) This case also involves relevant portions of the Arkansas Criminal Procedure as set forth in the Arkansas Statutes (Ark. Stat. § 43-2807(b), 1947), as set out below:

> "Individuals sentenced to life imprisonment prior to March 1, 1968, and those sentenced to life imprisonment after the effective date [February 12, 1969] of this Act, shall not be eligible for release on parole unless such sentence is commuted to a term of years by executive clemency."

STATEMENT OF FACTS

The petitioner Harold Rogers was convicted of first degree rape after a jury trial in the Circuit Court of Sebastian County, Arkansas, Fort Smith District. Evidence adduced at trial showed that the rape victim was abducted at gun point in a shopping center and driven to a garage where she was forced to have sexual intercourse with the petitioner. The petitioner did not testify at the trial. The jury recommended and the judge imposed a sentence of life imprisonment.

The Supreme Court of Arkansas affirmed the petitioner's conviction finding no merit in the claims he now seeks to present to this Court.

POINTS TO BE RELIED ON

I

THE DECISION BELOW IS CLEARLY CORRECT. NONE OF PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED AT TRIAL.

II

PETITIONER'S SENTENCE DOES NOT PRESENT AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW.

ARGUMENT

I.

The decision below is clearly correct. None of Petitioner's constitutional rights were violated at trial.

The petitioner seeks to claim that the trial court did not allow sufficient voir dire examination on the issue of racial prejudice. The Arkansas Supreme Court after discussing the voir dire examination in this case stated:

> "In the case at bar, the transcript reveals that the voir dire consisted of approximately 473 pages and the court permitted most of this to be conducted by the defense counsel. In our view the trial court accorded the defense counsel great latitude in questioning the prospective jurors in a searching inquiry as to the existence of any subtle or subjective bias that would prevent a juror from rendering a fair and impartial verdict. The appellant has not demonstrated that he was denied any fundamental fairness in interrogating the jurors in order to make an informed decision whether to challenge the veniremen peremptorily or for cause. The trial court did not abuse its discretion." *Rogers* v. *State*, 257 Ark. 144 (1974), 515 S.W. 2d 79, 82.

An objective examination of the record in this case clearly establishes that the petitioner was given sufficient latitude in his voir dire as not to be denied any of his constitutional rights.[1] An examination of the complete voir dire of two jurors that petitioner uses as his examples to claim that there was undue restriction on voir dire fails to substantiate his claim.

---

[1] A total of thirty-six (36) prospective jurors were voir dired. The trial court only interfered with the voir dire examination of two jurors with respect to

Mr. Fred Siefenmorgen was asked the following questions before the trial court properly curtailed the examination; "Without belaboring that any more, sir, do you still adhere to your answer that you don't have any racial prejudice?" (T. 267); "Would you believe a white woman any more than you would believe a black man?" (T. 269-270); "Do you think there's any difference between black people and white people?"; "Do you live in an integrated neighborhood?"; and "Are there any black members in your church?"; "Have you ever had an unfortunate experience with a black man?"; and the questions

---

questions concerning racial attitudes. The trial court allowed extensive questioning of the prospective juror as shown by the following examples. Mrs. Raymond Goodman was asked without interference, "Do you have any Negroes residing in your community?"; "Have you ever had an unfortunate experience either with a black person in your community or any place?"; "Would you give more credence or weight to the testimony of a white person than you would the testimony of a black person?" (T. 178); and whether she would give more credence to the testimony of a police officer than the testimony of a black witness. (T. 179). Mrs. Gilmer Dixon, without interference, was asked: "Do you have any problems with interracial social gatherings?"; "Do you have any problems with integrated schools?"; (T. 187) and "You feel you have any prejudice against black people?" (T. 188). Mrs. Earl Coff was asked, "Do you live in an integrated neighborhood?"; "Do you have any problem with integrated schools?"; "Do you have any black members in your church?"; and "Do you have any black social friends?" (T. 201) Mr. Gayle Autry was asked without interference from the court, "Have you on any occasion been in interracial social gatherings?"; [A]re there any black members of your church?"; (T. 300) "Would you give more credence to the testimony of a white person than you would the testimony of a black?"; (T. 301) "Do you think there's any difference between black people and white people?"; and "Would you mind if your son, when he became sixteen or seventeen, went out with a black woman?" (T. 302) Mr. Louis Seiter was asked the following two questions without interference by the trial court. "Would you have any problem with interracial dating, . . . ?" and "But you wouldn't want your children to do it, is that correct?" (T. 403) Mrs. Ed Rauser was asked, "Is the neighborhood in which you live integrated?" (T. 536); "Are there any black members in your church?"; "Have there been any black visitors to your church?" (T. 539); "You wouldn't believe a white person before you would believe a black person?" (T. 541); and "Have you or any members of your family ever been victimized by a black person." (T. 543) The respondent could recite other examples of the broad questioning allowed by the trial court, but will not burden the brief further.

reproduced on pages 16 and 17 of the Petitioner's brief.

The examination of Mr. William Bartley is the only other example used by the petitioner to substantiate his allegation of being denied the opportunity for proper voir dire. The respondent respectfully submits that a fair examination of the record doesn't support his claim. The transcript shows that the following questions were asked subsequent to that portion quoted in the petitioner's brief:

> "Would you tell me what your general attitude about black people is?"; "Do you think black people are generally less capable and qualified that white people?"; "Have you ever had an unfortunate experience with a black person or has any member of your family?" (T. 438); and "Would you give any more credence to the testimony of a white woman than you would to a black man?" (T. 439)

The respondent respectfully submits that the facts of this case that none of the cases cited by the petitioner are not controlling. In both *Ham* v. *North Carolina*, 409 U.S. 524, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1972) and *Aldridge* v. *United States*, 283 U.S. 308, 75 L. Ed. 1054, 51 S. Ct. 470 (1931), this Court vacated the convictions because no voir dire was allowed concerning racial prejudice. As previously pointed out, the trial judge allowed extensive voir dire concerning possible racial prejudice on the part of prospective jurors. This Court in *Ham*, *supra*, U.S. at 527, S. Ct. at 833, L. Ed. 2d at 50, pointed out "that the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do by petitioner. Since a trial court "has broad discretion as to the questions to be asked on voir dire, the respondent submits that the petitioner has failed to show an

abuse of this discretion, especially since petitioner's counsel was allowed to conduct the voir dire. *Aldridge*, *supra*, U.S. at 310, L. Ed. at 1056.

". . . [I]f the court permits counsel to conduct the voir dir, he need not permit unlimited inquiry into a specific area of prejudice." *United States* v. *Delay*, 500 F. 2d 1361, 1366 (8th Cir. 1974).

A number of courts have affirmed convictions in cases in which substantially less voir dire was allowed than in this case. See, *Delay*, *supra*; *United States* v. *Thompson*, 490 F. 2d 1218 (8th Cir. 1974); *United States* v. *Powers*, 482 F. 2d 941 (8th Cir. 1973); cert. denied, 415 U. S. 923, 94 S. Ct. 1426, 39 L. Ed. 2d 479 (1974); *United States* v. *Bamberger*, 456 F. 2d 1119 (1972); *Giles* v. *State*, 183 A2d 359, 229 Md. 370 (1972), cert. denied, 372 U.S. 767, 10 L. Ed. 2d 137, 83 S. Ct. 1102 (1963); and *State* v. *Brooks*, 111 S.E. 2d 636 (S. C. Supreme Court, 1959), cert. denied, 365 U.S. 300, 5 L. Ed. 2d 689, 81 S. Ct. 707 (1961).

In view of the foregoing, respondent respectfully prays that this Court will deny petitioner's request for a Writ of Certiorari based on the claim of improper restrictions of voir dire concerning racial prejudice.

(2) The petitioner seeks to claim that he was denied a fair and impartial trial due to alleged bias and reprimands of the trial judge. The respondent submits that the relevant portions of the transcript do not support this claim.

The respondent contends that only comments made by the judge in the presence of the jury are relevant to the question of whether the petitioner was denied a fair trial. This position by

the respondent is taken as under Arkansas law in a case tried by a jury, the trial judge can fix the length of sentence only when the jury fails to agree on the sentence. Ark. Stat. Ann. § 43-2306 (Repl. 1964). The jury was able to reach agreement in the sentence in this case.

Of the examples of alleged basis and unwarranted reprimands cited by the petitioner in his petition, only one of them occurred in the presence of the jury. The once occurring in the presence of the jury was the exchange during the cross-examination of prosecutrix and is found on pages 23 and 24 of petitioner's brief.

The following example found on pages 24 and 25 of the petition occurred during a barside conference out of hearing of the jurors that started on page 274 of the recorded and ended on page 282.

"MR. MEYERSON: Could I explain the reason that I was asking those questions?

"THE COURT: You've told me, he has told me. You have told me that you do not know yet whether it will be or not. I find that, sir — and I say this without meaning to offend you — difficult to believe . . (T. 277-8).

"MR. MEYERSON: We can certainly ask questions to ascertain whether or not he's racially prejudiced, in our opinion, for our client.

"THE COURT: Well, I'm not going to permit you to go on and on and on, and I'm telling you if you came here to get my goat and to get me to get an error in here, which

it's beginning to look a little bit like, then I can ride this just as long as you can. I haven't got anything — I'll cancel all my affairs for the next two weeks, and I can take my own sweet time about this (T. 279-80).

"MR. MEYERSON: If it's not racial prejudice, what is the reason he doesn't want his daughter — [to date a black man]

"THE COURT: Doesn't it speak for itself?

"MR. MEYERSON: No. If it's not racial prejudice, I'd like to know what it is. It's not very obvious to me."

62 ALR 2d 198-199 states:

"Since the main mischief, in the view of most courts, the results from an attorney's receiving harsh treatment at the hands of the judge is infection of the jury with animus towards the defendant, it is almost a corollary that if the jury does not become aware of the chastening, no error can occur; and the cases pretty well bear out this conclusion."

The single remark which was made by the trial court in the presence of the jury does not merit review of this case by this court, since on numerous other occasions the trial court was solicitious of petitioner's counsel and the remark did not reflect on the merits of petitioner's case. In *Kokatsu* v. *United States*, 351 F. 2d 898, 904 (9th Cir. 1965), the court found remarks that "did not convey to the jury any impression of the guilt or innocence of appellant or impugn the integrity of either counsel" were not prejudicial error, especially since, "the court admonished the jury to disregard any comment which might in-

dicate his opinion regarding the case." In *United States* v. *Ross*, 321 F. 2d 61, 66 n. 3 (2nd Cir. 1963), cert. denied, 375 U.S. 894, 84 S. Ct. 170 (1964) 11 L. Ed. 2d 418, the Court found no error when the judge's remarks ". . . did not reflect on the defendant's case so much as on the way it was being handled."

The trial court in this case instructed, "I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything I have done or said has seemed to so indicate, you will disregard it." (T. 900)

The comment made by the Court in the presence of the jury when viewed in perspective cannot be said to amount to prejudicial ridicule but could be considered irritation with defense counsel. In *Walker* v. *Bishop*, 408 F. 2d 1378 (8th Cir. 1969), the Court found that irritation does not constitute reversable error.

This case is similar to *United States* v. *Liss*, 137 F. 2d 995, 999 (2nd Cir. 1943) cert. denied, 320 U.S. 772, 64 S. Ct. 78, 88 L. Ed. 462 (1943) in which the Court stated: "In a trial which lasts for eight court days, and in which there are so many accused, a judge's serenity is often unduly tried by the persistence of counsel; no doubt perfection should be the standard, but if we were to insist upon it, few convictions could survive."

On the basis of the record, petitioner's claims that he was denied a fair trial by the actions of the trial judge is unsupportable. Therefore, respondent prays that this Honorable Court will deny the petition for certiorari.

II.

Petitioner's sentence does not present an important question of constitutional law.

The petitioner seeks to claim that the imposition of a life sentence in his case constitutes a violation of the Eighth Amendment's prohibition against "cruel and unusual punishments."

The sentence imposed in this case is not "cruel in its excess of imprisonment. . . ." *Weems* v. *United States*, 217 U.S. 349, 377, 54 L. Ed. 793, 30 S. Ct. 544 (1910). ". . .[N]o one can deny that rape is one of the most morally reprehensible criminal offenses and, historically, the act has been the subject of the most severe penalties and public condemnation." *Rogers, supra*, S.W. 2d at 87.

Testimony in this case shows, contrary to petitioner's assertion, that the victim did suffer physical injury as a result of the rape. Dr. Douglas Smith, the gynecologist who examined the prosecutrix the night she was raped testified that her breasts were bruised and that the trauma would have been caused by pinching or biting. (T. 701 or 702). Also it is likely that the prosecutrix suffered psychological trauma due to being abducted at gun point, driven to a garage and raped.

The petitioner relied on the holding in *Workman* v. *Commonwealth*, 429 S.W. 2d 374 (Ky. Ct. of App., 1968) to support its claim that a life sentence in this case is cruel and unusual punishment. In a subsequent rape case, the same court in *Martin* v. *Commonwealth*, 493 S.W. 2d 714 (Ky. Ct. of App., 1973) found that a sentence of life without parole for a 24 year old was not cruel and unusual punishment.

The respondent respectfully submits that this Court should find that a life sentence for rape does not constitute cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States. The sentence in this case is not "so disproportionate to the offense committed as to shock the moral sense of the community." *Workman, supra,* at 377. Rape is a violent crime against the very personal dignity of the victim and a sentence of life imprisonment for the commission of the crime of rape in any case is not disproportionate to the offense committed.

CONCLUSION

WHEREFORE, for the reasons stated above, the Respondent respectfully submitted that the Petition should be denied.

Respectfully submitted,

JAMES GUY TUCKER, JR.
Attorney General
State of Arkansas

ARTHUR JOHN ANDERSON, JR.
Deputy Attorney General

ROBERT A. NEWCOMB
Assistant Attorney General
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Robert A. Newcomb, Assistant Attorney, do hereby certify that I have forwarded two (2) copies of the Brief for Respondent In Opposition to Mr. George Howard, Jr., 329½ Main Street, Pine Bluff, Arkansas 71601, and one copy to Mr. Nathaniel R. Jones, James I. Meyerson and George E. Hairston, N.A.A.C.P. - 1790 Broadway, New York, New York 10019, by placing same in the United States mails, postage prepaid this 26th day of March, 1975.

/s/ Robert A. Newcomb
ROBERT A. NEWCOMB
Assistant Attorney General